

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN BRAITO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant Mare Island Navy Yard,
JAMES V. FORRESTAL, Secretary of the
Navy,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAY 23 1947

PAUL E. O'BRIEN,

CLERK

No. 11772

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Northern District of California,
San Francisco, California.

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San Francisco, California.

Attorney for Defendants and
Appellees.

In the United States District Court, for the
Northern District of California, Southern Di-
vision

No. 25928-G

JOHN BRAITO,

Plaintiff,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant Mare Island Navy Yard;
JAMES V. FORRESTAL, Secretary of the
Navy,

Defendants.

COMPLAINT FOR REINSTATEMENT OF
CIVIL SERVICE EMPLOYEE AND FOR
COMPENSATION

Plaintiff complains of the defendants above
named and for cause of action against said defend-
ants alleges:

I.

The matter in controversy exceeds, exclusive of
costs or interest, the sum of three thousand dollars
(\$3,000) and arises under the Constitution and
Laws of the United States.

II.

That during all of the times herein mentioned
plaintiff was and now is a citizen of the United
States, now residing in the City of Benicia, State
of California. [1*]

* Page numbering appearing at foot of page of original certified
Transcript of Record.

III.

That during all times herein mentioned plaintiff was and now is a member of the Order of Sons of Italy in America, a fraternal organization, the Hermann Sons, a fraternal organization, the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and the United Federal Workers of America.

IV.

That during the period 1919 to 1922 plaintiff was a shipfitter at the Mare Island Navy Yard, located at Mare Island, California, and from 1925, until the time of his discharge as hereinafter set forth plaintiff was a Federal civil-service employee at said Mare Island Navy Yard, commencing as a shipfitter's helper, then becoming a shipfitter, and at the time of his discharge serving as a flange turner receiving \$8.64 per day.

V.

The defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times herein mentioned said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U. S. C. A. App. Sec. 1156, providing in part as follows:

Provided further, That during the national emergency declared by the President on Sept. 8, 1939, to exist, the provisions of section 6 of the [2] Act of August 24, 1912 (37 Stat. 555; 5 U. S. C. Sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an

opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.

VIII.

That on or about the 24th day of July, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 26th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political

opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Braitto, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. [3] You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

IX.

That on or about the 4th day of August, 1941, plaintiff, informed said Friedell in writing as follows:

In conformity with the proceedings of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you, to be informed of the reason for having been discharged, from employment at the Navy Yard

(Mare Island), herewith I, John Braitto, respectfully and truthfully, wish to submit to you Sir, this statement:

In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915, A. D.

The solemn oath I took on the 26th day of August 1915, in the Superior Court of San Francisco, on which day I became a citizen of the United States of America, is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High school, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly prepared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braitto family.

The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and city of Vallejo (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable. [4]

In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

As I have been employed in Mare Island Navy Yard for about 19 years, I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter.

X.

That since the 4th day of August, 1941, plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth and for reinstatement as a civil-service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

XI.

That plaintiff was and is entitled to the notice and [5] hearing provided for by Congress in said Public Law No. 671 as a condition precedent to the removal of civil-service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671 and a violation of the right of plaintiff to due process of law as provided for in the 5th Amendment to the Constitution of the United States.

XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organization to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made mean-

ingless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both, as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did advocate the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance [6] with said organization to bring its program to fruition.

XIII.

That plaintiff is wholly without remedy in the premises and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671 that plaintiff will suffer irreparable injury.

XIV.

That at the time of the removal of plaintiff as aforesaid there was due plaintiff certain accrued leave with pay amounting to approximately four hundred dollars (\$400.00); that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil-service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.
2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.
3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.
4. For such other and further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSEN, RESNER,
SAWYER & EDISES,

By /s/ HERBERT RESNER,
/s/ MYER C. SYMONDS,

Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco—ss.

John Braitto, being first duly sworn, deposes and says:

That he is the plaintiff named in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ JOHN BRAITO.

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal] ALICE C. MORSE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 6, 1946. [8]

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR REIN-
STATEMENT OF CIVIL SERVICE EM-
PLOYEE AND FOR COMPENSATION

Comes now plaintiff and, as of right, files this; his first amended complaint herein, and complains of the defendants above named and for cause of action against said defendants alleges:

I.

The matter in controversy exceeds, exclusive of costs or interest, the sum of three thousand dollars (\$3,000) and arises under the Constitution and Laws of the United States.

II.

That during all of the times herein mentioned plaintiff was and now is a citizen of the United States, now residing in the City of Benicia, State of California.

III.

That during all times herein mentioned plaintiff was and now is a member of the Order of Sons of Italy in America, a fraternal organization, the Hermann Sons, a fraternal organization, the International [9] Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and the United Federal Workers of America.

IV.

That during the period 1919 to 1922 plaintiff was a shipfitter at the Mare Island Navy Yard, located at Mare Island, California, and from 1925, until the time of his discharge as hereinafter set forth plaintiff was a Federal Civil-service employee at said Mare Island Navy Yard, commencing as a shipfitter's helper, then becoming a shipfitter, and at the time of his discharge serving as a flange turner receiving \$8.64 per day.

V.

The defendant Grover C. Klien, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times herein mentioned said defendant Klien and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U. S. C. A. App. Sec. 1156, providing in part as follows:

Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U. S. C. Sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the [10] period of removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after

such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits or both, as he may desire to show why he should be retained and not removed.

VIII.

That on or about the 24th day of July, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 26th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there would not be the least concern on the part of their associations or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Braitto, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

IX.

That on or about the 4th day of August, 1941, plaintiff informed said Friedell in writing as follows:

In conformity with the proceeding of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you,

to be informed of the reason for having been discharged from employment at the Navy Yard (Mare Island), herewith I, John Braitto, respectfully and truthfully, wish to submit to you [11] Sir, this statement:

In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915 A. D.

The solemn oath I took on the 26th day of August, 1915, in the Superior Court of San Francisco on which day I became a citizen of the United States of America is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High School, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly pre-

pared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braitto family.

The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and city of Vallejo (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable.

In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

As I have been employed in Mare Island Navy Yard for about 19 years. I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter.

X.

That since the 4th day of August, 1941, plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth and for reinstatement as civil-service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit

the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671, as a condition precedent to the removal of civil-service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671, and a violation of the right of plaintiff to due process of law as provided for in the 5th amendment to the Constitution of the United States.

XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any [13] charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organizations to bring the said purpose to fruition.

In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did advocate the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

XIII.

That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the

press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law.

XIV.

That plaintiff is wholly without remedy in the premises, and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671, that plaintiff will suffer irreparable injury.

XV.

That at the time of the removal of plaintiff, as aforesaid, there was due plaintiff certain leave with pay amounting [14] to approximately four hundred dollars (\$400.00) that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil-service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such and other further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSON, RESNER
& SAWYER

By /s/ HERBERT RESNER

By /s/ NORMAN LEONARD

Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss:

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the within and foregoing action and makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is at present out of the county in which affiant has his office; that he has read the within and foregoing first amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

NORMAN LEONARD. [15]

Subscribed and sworn to before me this 30th day of January, 1947.

ALICE C. MORSE,
Notary Public for the City and County of San
Francisco, State of California.

Acknowledgment of receipt of copy.

[Endorsed]: Filed Jan. 31, 1947. [16]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him, and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds;

I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since said defendant had his official residence in the District of Columbia and is not an inhabitant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

IV.

That the complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will affect his rights, orders and statutory responsibilities and duties is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court. [17]

Wherefore defendants pray that said complaint be dismissed with prejudice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.
Attorneys for Defendants.

[Endorsed]: Filed Jun. 23, 1947. [18]

NOTICE OF MOTION

To Plaintiff above named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 240 Montgomery Street, San Francisco, 4, California, his attorney:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 258, Post Office and Court House Building, City and County of San Francisco, California, on the 30th day of June, 1947, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

FRANK J. HENNESSY

United States Attorney.

WILLIAM E. LICKING,

Assistant United States
Attorney.

Attorneys for Defendants.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

The action of the Secretary of the Navy, through the Commandant of the Mare Island Navy Yard, in discharging plaintiff from his civil-service position was taken pursuant to statutory authority (50 USCA App. Sec. 1156.). Plaintiff's complaint states, at most, an alleged improper exercise of that authority in failing, after dismissal, to fully inform plaintiff of the reasons for his removal. It does not state a case of extra-official action without legislative sanction. Whether plaintiff alleges facts entitling him to reinstatement or to an opportunity to

be more fully informed of the reasons for his dismissal, the [20] Secretary of the Navy in whom is vested the statutory power of dismissal and of reinstatement under 50 USCA App. Sec. 1156, is an indispensable party to the action. (*Neher v. Harwood*, 128 F. 2d 846, [9th Cir.] Cert. Denied Oct. 12, 1942.)

Ordered:

Defendants' motion to dismiss is granted for lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action.

Dated: August 5, 1947.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed Aug. 5, 1947. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73 (B)

Notice Is Hereby Given that James Briato, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above entitled action entered in this action on the 5th day of August 1947.

Dated: August 11, 1947.

GLADSTEIN, ANDERSON, RESNER
& SAWYER,

NORMAN LEONARD,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1947. [22]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now John Braitto, plaintiff and appellant herein, and designates the following as the record on appeal in the above entitled matter:

1. Complaint for Reinstatement of Civil Service Employee and for Compensation, filed herein on May 6, 1946.

2. First Amended Complaint for Reinstatement of Civil Service Employee and for Compensation filed herein on January 31, 1947.

3. Motion to Dismiss.

4. Order Granting Motion to Dismiss, filed herein on August 5, 1947.

5. Notice of Appeal, filed herein on August 12, 1947.

6. This Designation of Record on Appeal.

Dated: August 12, 1947.

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,
NORMAN LEONARD,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1947. [23]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good Cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including November 1, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 23, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sep. 23, 1947. [24]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of John Braitto, Plaintiff, vs. Grover C. Klein, etc., and James V. Forrestal, etc., Defendants, No. 25928 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$9.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of October, A.D. 1947.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [25]

No. 11772. United States Circuit Court of Appeals for the Ninth Circuit. John Braitto, Appellant, vs. Grover C. Klein, Rear Admiral, United States Navy, Commandant Mare Island Navy Yard, James V. Forrestal, Secretary of the Navy, Appelles. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 28, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11772

JOHN BRAITO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant Mare Island Navy Yard,
et al,

Respondents.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS OF
RECORD TO BE PRINTED.

Comes now John Braitto, the appellant in the above entitled cause, and states that the points upon which he intends to rely in this court in this case are as follows:

I.

That the Court below erred in granting respondents' motion to dismiss.

II.

That the Court below erred in entering its order dismissing the said action.

III.

That the Court below erred in determining that the Secretary of the Navy is an indispensable party to the action.

IV.

That the Court below erred in determining that the complaint does not state a case of extra-official action without legislative sanction.

V.

Appellant further states that the whole of the record as filed is necessary for the consideration of the case.

Dated: This 12th day of August, 1947.

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,

/s/ NORMAN LEONARD,
Attorneys for Appellant.

